

No. 91-2051

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,
Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF
THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUS-
SEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE
RIVER SIOUX TRIBE GAME, FISH AND PARKS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR CORSON COUNTY AND LYMAN
COUNTY, SOUTH DAKOTA, AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE

Amicus Corson County is located on the west side of the Missouri River in northern South Dakota. The county contains the South Dakota portion of the original Standing Rock Sioux Reservation.¹ There is a taken area in Corson County similar to the taken area in this case,

¹ See *Solem v. Bartlett*, 465 U.S. 463, 472, n.14 (1984).

created by the Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958).²

Amicus Lyman County is located in south central South Dakota, again on the west side of the Missouri River. The bulk of the Lower Brule Sioux Reservation lies within the northwestern corner of Lyman County. This reservation, as well, has a taken area, the result of two acts: the Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958), and the Big Bend (Lower Brule) Act, Pub. L. No. 87-734, 76 Stat. 698 (1962).

Both counties have been subject to the General Allotment Act of 1887, 24 Stat. 388, and subsequent individual land acts.³ As a result, there is an extensive non-member population and land holdings in these counties.

Further, hunting and fishing jurisdiction in Lyman County has been the subject of extensive litigation in *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983) *cert. denied*, 464 U.S. 1042 (1984). This litigation has since been recommenced, *Lower Brule Sioux Tribe v. State of South Dakota, et al.*, No. 91-3036 (D.S.D. filed October 1991), but is being held in abeyance pending this Court's decision in this case. Although Respondents in *Bourland* did not appeal that portion of the District Court opinion holding that the Tribe did not have authority to regulate non-Indian hunting and fishing on non-Indian owned fee land,⁴ the Lower Brule Sioux Tribe, ignoring *Montana v. United States*, 450 U.S. 544 (1981), is alleging they do have the power to regulate all non-Indian hunting and fishing on privately and publicly held fee lands within the boundaries of their reservation.

² *State of South Dakota v. Bourland*, 949 F.2d 984, 988, n.10 (8th Cir. 1991).

³ See, e.g., *Montana v. United States*, 450 U.S. 544 (1981).

⁴ *Bourland*, 949 F.2d at 989, n.11.

Amici Counties are interested in seeing law implemented which can realistically be put into operation. The holding of the Court of Appeals only further complicates an already complex situation. The law needs to be consistent, fair, and provide realistic solutions to the complex problems encompassing these areas. County law enforcement and prosecutorial officials need to know what power they have to enforce their laws. Residents of the counties and others who are not tribal members need to know with certainty the jurisdiction they enter and when they venture into and out of the taken area. Finally, *amici* Counties view this case as an opportunity for the Court to reaffirm its prior rulings in the area of tribal civil regulation over land not owned by the Tribe or tribal members.

SUMMARY OF ARGUMENT

Based on this Court's previous holdings, the Cheyenne River Sioux Tribe and Respondent tribal officials do not have jurisdiction to regulate non-member hunting and fishing in the taken area along the Missouri River, since they no longer have power to exclude non-members from that area.

ARGUMENT

1. The theory behind the opinion below that the Cheyenne River Sioux Tribe never lost its right to control and regulate non-member hunting and fishing in the taken area is that the treaty right to have the exclusive control over the land, and thus control all hunting and fishing, has not been expressly relinquished by the Tribe or expressly modified by Congress.

The 1868 Fort Laramie Treaty, 15 Stat. 635, granted the Sioux the exclusive right to use and control their lands.⁵ Although not specifically mentioned in the treaty, "arguably" implicit in this right was the right to control

⁵ The Yakima Indian Tribe had the same treaty language with the United States, see *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 415, n.1 (1989).

hunting and fishing on these lands. *State of South Dakota v. Bourland*, 949 F.2d 984, 991 (8th Cir. 1991), *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 814 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). This Court said almost the same thing in *Montana*, in commenting on similar language in the 1868 Fort Laramie Treaty with the Crow Tribe, 15 Stat. 649, when it stated:

The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, *arguably* conferred upon the Tribe the authority to control fishing and hunting on those lands.

450 U.S. at 558-559 (emphasis added). See, Brief for Petitioner, 14-17.

The right that both the Crow Tribe and the Cheyenne River Sioux Tribe have to regulate non-member hunting and fishing thus arguably comes from their power to exclude non-members from tribal lands. But this Court, in *Montana*, went on to recognize that power is limited.

But that authority could only extend to land on which the Tribe exercised "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388. . . . If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559.

This Court had further occasion to discuss the regulatory powers of Indian Tribes in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989). The plurality opinion clearly states:

Meanwhile, *Montana* is directly to the contrary: the Court there flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers.

Brendale, 492 U.S. at 424 (White, J., plurality opinion). (The opinion of Justice Blackmun traces the development of this area of law and highlights the differences in the *Brendale* opinions. See *Brendale*, 492 U.S. at 448-468 (Blackmun, J., concurring in the judgment and dissenting)).

Further, in the dissent in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), Justice Stevens aptly described *Montana* in the following manner:

In *Montana v. United States*, *supra*, the Court held that the Crow Tribe could not prohibit hunting and fishing by nonmembers *on reservation land no longer owned by the Tribe*, and indicated that the principle underlying *Oliphant*—that tribes possess limited power over nonmembers—was applicable in a civil as well as a criminal context. As stated by the Court, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, *supra*, at 565 (footnote omitted).

Merrion, 455 U.S. at 171-172 (Stevens, J., dissenting) (footnotes omitted) (emphasis added).

The logical result of this Court's teaching in *Montana* and *Brendale* is if a tribe no longer has the right to exclusively occupy and limit or prohibit non-member access onto land, they then have lost their civil regulatory powers over that land. The Court of Appeals, in its opinion, however, disagrees. The Court of Appeals went further to compare the policies underlying the General

Allotment Act with the legislation authorizing the construction of the Missouri River dams. The opinion then states:

It is obvious then, that the Cheyenne River Act was not a simple conveyance of the land and all attendant interests in the land. Significant portions of the "bundle of property rights" explicitly were reserved to the Tribe. The purpose of the Act, unlike that of the Allotment Act at issue in *Montana*, was not the destruction of tribal self-government, but was only to acquire the property rights necessary to construct and operate the Oahe Dam and Reservoir.

Bourland, 949 F.2d at 993.

The Court of Appeals then concluded, based what it incorrectly deemed to be different Congressional intent, that the Tribe's right to control non-member hunting and fishing in the taken area had not been eliminated. Even assuming different Congressional intent, that is beside the point. The one thing which did not survive the sale of the 104,000 acres by the Cheyenne River Sioux Tribe to the federal government was the Tribe's right to exclude non-members from that land. Even this fact was recognized in *Bourland*:

This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 1193. Further, Section Four of the Flood Control Act requires that the "water areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken area subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities.

949 F.2d at 995 (emphasis added).

This conclusion flies in the face of the rulings of *Montana* and *Brendale*. The Tribe's power to regulate hunting and fishing comes from its power to exclude the non-member hunter or fisherman from the land. Congress expressly took that power away from the Tribe in the Flood Control Act and the Cheyenne River Act. Consequently, the Tribe lost any treaty-based right to regulate non-Indian hunting and fishing in the taken area when it sold the land to the federal government.

Montana and *Brendale* also arguably indicate that the Tribe may have a right to regulate the hunting and fishing of non-Indians within the taken area pursuant to its "inherent tribal sovereignty". However, as the Court of Appeals recognized:

The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied.

Bourland, 949 F.2d at 995. Moreover, the plurality opinion in *Brendale* appropriately limited even this *Montana* exception. See Brief for Petitioner, 19-21.

Consequently, the Tribe has no power to regulate hunting and fishing of non-members within the taken area on this reservation.

2. In the final analysis, the Court of Appeals simply missed its usual way in this instance and it was helped along by the United States. *Amici* would be remiss if we neglected to mention the supporting role the United States has played in this process in the Eighth Circuit and in this Court.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *Montana*, *Brendale*, and *Duro v. Reina*, 495 U.S. 676 (1990), reflect historical arguments and documentation that this Court found authoritative and persuasive. Importantly, the United States, advocating tribal territorial sovereignty on behalf of its constituent agen-

cies, formally resisted and rejected every argument of substance in each case (except *Brendale*) until this Court announced its Opinion. Even then, the United States acknowledged only the most narrow application, while renewing all remaining arguments in related litigation then pending, as it has here. Brief for the United States, *Amicus Curiae, State of South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991).

In the process, longstanding views of other constituent agencies expressly in conflict with this tribal territorial sovereignty agenda are too often simply ignored by the United States. For example, in this instance the past position of the Army Corps of Engineers clearly supports Petitioner, but it received little, if any, consideration in the Court of Appeals. Brief for Petitioner at 45-47. Yet, for decades the position of the Army Corps of Engineers has been relied on by the general public, by the Tribes, by *Amici*, by Petitioner, and presumably by Congress. Brief for Petitioner at 45-47. *Amici* would respectfully submit that this is the background and these are the considerations that should be borne in mind when the Solicitor General expresses the views of the United States in this case.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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